FILE COPY

Office Supreme Court, U.S.
FILED
JAN 6 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 581

GERALD DUNITZ, *et al.*,

Appellants,

vs.

THE CITY OF LOS ANGELES, *et al.*,

Appellees.

On Appeal From the Supreme Court of the State of California.

MOTION OF APPELLEES TO DISMISS.

ROGER ARNEBERGH,
City Attorney,
BOURKE JONES,
Assistant City Attorney,
MARCUS E. CRAHAN, JR.,
Deputy City Attorney,
400 City Hall,
Los Angeles 12, California,
Attorneys for Appellees.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX

PAGE

Statement of the facts on appeal 2

Basis of the decision of the District Court of Appeal of the State of California 4

Statement of the case on appeal 5

Argument 7

I.

The judgment of the District Court of Appeal of the Second Appellate District of the State of California affirming the judgment of the trial court rests on an adequate nonfederal basis 7

A. The decision of the District Court of Appeal affirming the judgment of dismissal of the Superior Court rests on the nonfederal basis of California pleading and practice 7

B. The decision of the District Court of Appeal may be adequately supported on the nonfederal basis of failure to exhaust administrative remedies 9

II.

The federal question sought to be reviewed here was not expressly passed on by the California courts 10

III.

This appeal does not present a substantial federal question 12

A. This appeal fails to present a substantial federal question for the reason that appellants have failed to exhaust available and adequate administrative remedies 12

B. This appeal fails to present a federal question with respect to Sections 96.100 through 96.128 of the Los Angeles Municipal Code for the reason that these sections constitute a valid and proper exercise of the police and taxing powers of the City of Los Angeles 15

PAGE

1. The subject sections of the Los Angeles Municipal Code are reasonably related to accomplishing a public health, safety, morals or general welfare objective, and are not arbitrary 15

2. Appellants' contentions with respect to the meaning of the subject sections of the Los Angeles Municipal Code and to their enforcement by the appellees are not supported by the plain meaning of their provisions or by the facts in the Record on Appeal 20

C. This appeal fails to present a federal question with respect to the application of the ordinance to the appellants for the reason that on the basis of the facts contained in the Record on Appeal such a question is not before this court 24

Summary 26

Conclusion 27

Appendices:

Appendix A. Statement of jurisdiction ..... App. p. 1

Appendix B. Opinion and order upon general demurrer ..... App. p. 5

TABLE OF AUTHORITIES CITED

CASES	PAGE
Abelliera v. District Court of Appeal, 17 Cal. 2d 280, 132 A. L. R. 715	9
Armistead v. City of Los Angeles, 152 Cal. App. 2d 319	22
Bates v. Batte, 187 F. 2d 142, cert. den. 342 U. S. 815	12
Berman v. Parker, 348 U. S. 26	16
Boyd v. Sierra Madre, 41 Cal. App. 520	16
California State Auto etc. Bureau v. Downey, 96 Cal. App. 2d 876	18
California State Auto Assn. Inter-Insurance Bureau v. Maloney, 341 U. S. 105	17
Chappell Chemical and Fertilizer Co. v. Sulphur Mines Co. of Virginia, 172 U. S. 465	7
Clemons v. City of Los Angeles, 36 Cal. 2d 95	16
Durley v. Mayo, 351 U. S. 277, rehear. den. 352 U. S. 859	12
Erie Railroad Company v. Williams, 233 U. S. 685	16
First National Benefit Society v. Garrison, 59 Fed. Supp. 962, 155 F. 2d 552	17
Gaylord v. City of Pasadena, 175 Cal. 433	18
Haddacheck v. Sebastian, 239 U. S. 394, affm'g 165 Cal. 416	16
Hollery v. Lawrence, 317 U. S. 518, rehear. den. 318 U. S. 798	7
Holmes v. United States, 89 Fed. Supp. 894, aff'd 339 U. S. 927, rehear. den. 339 U. S. 954	13
Imperial Mutual Life Insurance Co. v. Caminetti, 59 Cal. App. 2d 501	9
Lawton v. Steel, 152 U. S. 133	16
L'Hote v. New Orleans, 177 U. S. 587	16
Lichter v. United States, 334 U. S. 742	12
Lynch v. New York ex rel. Pierson, 293 U. S. 52	12
Lynn v. Duckel, 46 Cal. 2d 845	9
Maguire v. Reardon, 41 Cal. App. 596, aff'd 255 U. S. 271	16

PAGE

Metcalf v. County of Los Angeles, 21 Cal. 2d 267 9

Miller v. Board of Public Works, 195 Cal. 477, 38 A. L. R. 1497 16

Mitchell v. Morris, 94 Cal. App. 2d 446 18

Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41 ..... 9, 12, 13, 14

Odd Fellows Cemetery Assn. v. San Francisco, 140 Cal. 226 16

Ohio ex rel. Iaus v. Carlton, 154 N. E. 2d 150, dismissed 359 U. S. 312, 3 L. Ed. 2d 831 13

O'Neil v. Vermont, 144 U. S. 323 7

People v. Johnson, 129 Cal. App. 2d 1 16

Perepletchikoff v. City of Los Angeles, 174 A. C. A. 749, 345 P. 2d 261 ..... 14, 21, 27

Perkins v. Endicott Johnson Corp., 128 F. 2d 208, aff'd 317 U. S. 501 13

Petersen, In re, 51 Cal. 2d 177 18

Poulos v. State of New Hampshire, 345 U. S. 395, rehear. den. 345 U. S. 978 ..... 14, 27

Public Service Comm. of Utah v. Wycoff, 344 U. S. 237 ..... 12, 13

Queenside Hills Realty Co. v. Saxl, 328 U. S. 80 16

Sandstrom v. Cal. Horse Racing Board, 31 Cal. 2d 401, cert. den. 355 U. S. 814, 3 A. L. R. 2d 90 17

Staub v. Baxley, 355 U. S. 313 14

Stoetzner v. City of Los Angeles, 170 A. C. A. 485, 338 P. 2d 971 ..... 14, 21, 27

United Insurance Co. v. Maloney, 127 Cal. App. 2d 155, cert. den. 348 U. S. 937 9

United States v. Superior Court, 19 Cal. 2d 189 9

Western Union Telegraph Co. v. Wilson, 213 U. S. 52 7

Wheeler v. Gregg, 90 Cal. App. 2d 348 18

RULES

Revised Rules of the United States Supreme Court, Rule 16, Subsec. 1, par. (b) 1

STATUTES	PAGE
California Code of Civil Procedure, Sec. 1060	8
California Code of Civil Procedure, Sec. 1061	7
California Code of Civil Procedure, Sec. 1094.5	6
California Code of Civil Procedure, Sec. 1963(15)	14
California Health and Safety Code, Secs. 17821-17829	21
California Statutes of 1921, p. 689	8
Los Angeles Municipal Code, Chap. 9, Art. 1, Div. 49	18
Los Angeles Municipal Code, Chap. 9, Art. 6, Div. B	2
Los Angeles Municipal Code, Sec. 91.0103(a)	22
Los Angeles Municipal Code, Sec. 91.0103(a)(1)	23
Los Angeles Municipal Code, Sec. 91.0103(a)(3)	23
Los Angeles Municipal Code, Secs. 96.100-96.128	2, 5, 7, 10, 11, 15, 21, 24, 26
Los Angeles Municipal Code, Sec. 96.101(a)	18
Los Angeles Municipal Code, Sec. 96.101(a)(2)	22, 23
Los Angeles Municipal Code, Sec. 96.101(a)(10)	22, 23
Los Angeles Municipal Code, Sec. 96.101(a)(13)	20, 22, 23
Los Angeles Municipal Code, Sec. 96.101(b)	18
Los Angeles Municipal Code, Sec. 96.101.2	18
Los Angeles Municipal Code, Sec. 96.112	18
Los Angeles Municipal Code, Sec. 96.119	19
Los Angeles Municipal Code, Sec. 96.120.1	19
Los Angeles Municipal Code, Sec. 96.121	19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No.

GERALD DUNITZ, *et al.*,

Appellants,

vs.

THE CITY OF LOS ANGELES, *et al.*,

Appellees.

On Appeal From the Supreme Court of the State of California.

MOTION OF APPELLEES TO DISMISS.

Respondents below and Appellees herein respectfully move that the appeal in this cause be dismissed under Rule 16, subsection 1, paragraph (b) of the Revised Rules of the Supreme Court of the United States upon each of the following grounds.

1. The appeal does not present a substantial federal question;

2. The federal questions sought to be reviewed were not expressly passed on by the California Courts;

3. The judgment rests on an adequate non-federal basis.

Statement of the Facts on Appeal.

This is an appeal from the judgment of the District Court of Appeal for the Second Appellate District of the State of California affirming the judgment of dismissal of the Superior (trial) Court of said State in and for the County of Los Angeles after said Superior Court had sustained a general demurrer to Appellants' amended complaint without leave to amend, and entered a judgment dismissing the action.

The only factual situation which is before this Court is that which is well-pleaded in the amended complaint. Reading that which is well-pleaded in the complaint, the following appears:

Appellants are the owners of a certain parcel of industrial property in the City of Los Angeles upon which are located some thirty commercial buildings of various ages and types of construction having a total valuation of One Million Dollars.

The City of Los Angeles has from time to time adopted certain ordinances enacting and amending a Municipal Code, within which are contained certain sections, namely Sections 96.100 through 96.128, which provide for the repair, vacation or demolition of "dangerous or substandard" buildings. These Sections comprise Division B of Article 6 of Chapter 9 of said Code, which Chapter regulates matters of building construction and maintenance.

In December of 1956 the Appellants received from the Department of Building and Safety of the City of Los Angeles a notice under the authority of said Article and

Chapter of the Municipal Code stating that said Department had inspected certain buildings located on Appellants' property and had filed a report as to the condition of the buildings thereon with the Board of Building and Safety Commissioners of said City, and that the Board, after determining from the report that there was probable cause to believe that said buildings are dangerous and constitute a public nuisance, set the matter for hearing before the Board as prescribed by said Article and Chapter of said Code in February of 1957.[1] That accompanying said notice the Appellants received a copy of said inspection report.

Subsequently, the said Department inspected and similarly reported to said Board on certain additional buildings located on Appellants' said property. The Board continued the matters previously set for hearing several times until in November of 1957, all matters were consolidated and set for hearing in January of 1958. Notices of each such additional inspection and hearing date were sent to and received by the Appellants.

In December of 1957, and prior to the date set for the hearing, the Appellants requested said Board to amend the property descriptions contained in the said notices, or, in

---

[1]Appellants' statement with respect to the content of said notices as set forth on page 6 of the Statement of Jurisdiction is not in accord with the record. Appellants state that the notices require Appellants "to show cause why said buildings should not be ordered demolished." On the contrary, said notices, as set forth in Paragraph VIII of their complaint, state that Appellants are ordered to appear and show cause why said buildings should not be condemned as public nuisances and abated by reconstructing or properly repairing them or by razing and removing them.

the alternative, to continue the hearing until such time as the appellants could test the validity of the proceedings in Court. Shortly thereafter Appellants filed the subject complaint for injunction and declaratory relief.

The judgment of the Superior Court is set forth as an exhibit in the Record on Appeal herein.

The "Opinion and Order Upon General Demurrer" of said Court is set forth in Appendix B of the Appellant's Statement of Jurisdiction on file herein. This memorandum opinion does not constitute a judgment; it is merely an expression of the thinking of the trial court. (Opinion of District Court of Appeal Herein, Statement of Jurisdiction, Appendix A, page 6.)

The opinion of the District Court of Appeal affirming the judgment of the Superior Court is set forth in Appendix A of the Statement of Jurisdiction. Said opinion constitutes the judgment of the District Court of Appeal.

Basis of the Decision of the District Court of Appeal of the State of California.

In affirming the judgment of dismissal the District Court of Appeal makes the following statements:

"We have reached the conclusion that the lower court properly exercised its discretion under section 1061 of the Code of Civil Procedure in sustaining the demurrer and thereby denying the plaintiffs declaratory relief. Whether declaratory relief should be granted is a matter within the trial court's discretion and its denial of that remedy will not be disturbed on appeal unless it is clearly shown that the discretion was abused. (Citation of Authority)" (App. A, Statement of Jurisdiction, p. 2)

"It would unduly prolong this opinion and serve no useful purpose to state in detail the controversies that are alleged to exist between the parties. Suffice it to say that none of them state a present existing controversy based upon facts alleged to exist in the present proceedings to which declaratory relief should be addressed." (App. A, Statement of Jurisdiction, pp. 4 and 5)

"The trial court properly refused to undertake by declaratory judgment to define in the abstract the meaning of the numerous provisions of the ordinance under consideration or the constitutionality of their application by the defendants. (Citation of Authority)" (App. A, Statement of Jurisdiction, pp. 6 and 7)

Statement of the Case on Appeal.

It appears from Appellants' Statement of Jurisdiction:

1. That Appellants seek a judicial declaration that sections 90.100 through 90.128 of the Los Angeles Municipal Code (As set forth in Appendix C of the Statement of Jurisdiction) are invalid *on their face*, and seek further to have enforcement of said sections against them enjoined.

2. That Appellants seek such declaration and injunction to halt a course of proceedings conducted by the Board of Building and Safety Commissioners of the City of Los Angeles and instituted by said Board to inquire into a report submitted to it by the Department of Building and Safety of said City stating that certain commercial buildings owned by the Appellants and located within the City of Los Angeles contained some 340 deficiencies.

3. That Appellants seek such declaration and injunction before such hearings have been commenced, and before said Board has received evidence, made a determination thereof or issued any order with respect to Appellants' property.

4. That Appellants seek and have continuously sought herein, judicial intervention at the inital stages of administrative proceedings, and before completion of the adnfinistrative process.

5. That Appellants seek such intervention despite the fact that no order adverse to the Appellants may result from said administrative proceedings; and despite the fact that if any such order does result therefrom, that such an order may be valid and proper in light of the facts adduced.

6. That Appellants seek such intervention despite the fact that Appellants have an adequate remedy with which to test the validity or propriety of any order which may result therefrom under Section 1094.5 of the California Code of Civil Procedure.[2]

---

[2]Sec. 1094.5 Cal. Code Civ. Procedure is set forth in full as Appendix A of this motion to dismiss.

ARGUMENT.

I.

The Judgment of the District Court of Appeal of the Second Appellate District of the State of California Affirming the Judgment of the Trial Court Rests on an Adequate Nonfederal Basis.

A. The Decision of the District Court of Appeal Affirming the Judgment of Dismissal of the Superior Court Rests on the Nonfederal Basis of California Pleading and Practice.

It is apparent on the face of the Record on Appeal that neither the judgment of the Superior Court nor the judgment affirming it of the District Court of Appeal specifically decides the constitutionality of sections 90.100 through 90.128 of the Los Angeles Municipal Code.

As set forth hereinabove, the decision of the District Court of Appeal is based entirely upon the California law, as set forth in statutes and judicial decisions, with respect to pleading and practice; and as such is not properly subject to review by this Court. (*Western Union Telegraph Co. v. Wilson*, 213 U. S. 52; *Chappell Chemical and Fertilizer Co. v. Sulphur Mines Co. of Virginia*, 172 U. S. 465; *O'Neil v. Vermont*, 144 U. S. 323; *Hollery v. Lawrence*, 317 U. S. 518, rehearing denied 318 U. S. 798).

The District Court of Appeal makes specific reference to section 1061 of the California Code of Civil Procedure and states that in its opinion the trial court's dismissal of the action upon sustaining a general demurrer to Ap-

pellants' amended complaint was a proper exercise of its discretion thereunder. Said section states:

> "The Court may refuse to exercise the power granted by this Chapter. (Declaratory Relief Act of the State of California, Sec. 1061 *et seq.* of the Cal. Code of Civ. Proc.)[3] in any case where its declaration or determination is not necessary or proper at the time and under all the circumstances." (Parenthesis added; California Statutes, 1921, p. 689).

In justifying its decision, and in further emphasis of the fact that the decision of the trial court is based entirely upon California pleading and practice, the District Court of Appeal states:

> "This is so because it cannot be determined from the complaint what the nature or character of the deficiencies in plaintiffs' building are asserted to be and it cannot therefore be determined whether the plaintiffs will be adversely affected by the numerous sections of the ordinance here attacked in the proceedings commenced by the defendants. What the plaintiffs seek in this action is not a declaration of their rights under the ordinance as applied to a definite factual situation but is an advisory opinion from the courts as to the validity and meaning of the numerous sections of the code attacked." (App. A. Statement of Jurisdiction, p. 5)

---

[3]Sec. 1060, Cal Code of Civ. Proc. is attached hereto as Appendix B.

B. The Decision of the District Court of Appeal May Be Adequately Supported on the Nonfederal Basis of Failure to Exhaust Administrative Remedies.

The California Supreme Court has repeatedly held that available and adequate administrative remedies must be exhausted before resort may be had to the California courts for any relief. (*United States v. Superior Court*, 19 Cal. 2d 189; *Abelliera v. District Court of Appeal*, 17 Cal. 2d 280, 132 A. L. R. 715; *Lynn v. Duckel*, 40 Cal. 2d 845; *Imperial Mutual Life Insurance Co. v. Caminetti*, 59 Cal. App. 2d 501; *Metcalf v. County of Los Angeles*, 24 Cal. 2d 267.)

Thus, it is the rule of California pleading and practice that before available and adequate administrative remedies are exhausted, a plaintiff cannot state facts sufficient to constitute a cause of action for any judicial relief (except where to exhaust the remedy would result in irreparable injury) for the reason that until such exhaustion the California courts do not have jurisdiction to proceed. This rule applies even where plaintiff attacks the validity of the statute providing the remedy to be exhausted.

The California rule in this respect is well stated in the case of *United Insurance Co. v. Maloney*, 127 Cal. App. 2d 155, at pages 158-159, in which this Court denied petition for writ of certiorari, 348 U. S. 937.

In *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51-52, it is said:

> "Obviously, the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the pre-

scribed administrative hearing would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact."

The Appellees respectfully submit that this statement is particularly applicable to and determinative of the instant case.

II.

The Federal Question Sought to Be Reviewed Here Was Not Expressly Passed on by the California Courts.

Both the trial court and the District Court of Appeal have declared that Appellants' amended complaint is properly subject to general demurrer under the applicable law of California pleading and practice for the reason that said complaint fails to state *facts* sufficient to constitute a cause of action for either injunctive or declaratory relief.

Therefore, not only does the decision of the District Court of Appeal rest on an adequate nonfederal basis, it is apparent from the face of said complaint and from the Record on Appeal that Appellants have failed to properly raise the constitutionality of sections 96.100 through 96.128 of the Los Angeles Municipal Code before the California courts.

Furthermore, it is apparent from its opinion herein that the federal question sought to be presented in this appeal was not expressly passed upon by the District Court of Appeal.

The only statement made by the District Court of Appeal which might be asserted to constitute a decision by said court on the validity of the challenged sections of the Los Angeles Municipal Code is the following:

> "The defendant city has the power through its administrative agency to abate nuisances and within constitutional limits to force property owners to abate conditions which in fact constitute nuisances or hazards to the public health or safety and neither this court nor could the trial court assume that in the present proceedings the defendants will attempt to exercise the police power of the city beyond its constitutional limits. If they do so the plaintiffs have an adequate remedy under section 1094.5 of the Code of Civil Procedure and if in such proceedings the decision should be adverse to them, by appeal from such decision." (App. A, Statement of Jurisdiction, p. 6)

It is obvious that said statement is not an expression of the court upon the constitutionality of sections 96.100 through 96.128 of the Los Angeles Municipal Code, but is a further expression by the court of Appellants' present position before the California courts with respect to the jurisdiction and appropriateness of said courts to proceed under the allegations as set forth in the amended complaint.

As is stated by the District Court of Appeal (App. A Statement of Jurisdiction, note 2, p. 6), the extended opinion of the trial court (App. B, Statement of Jurisdiction) does not constitute a judgment in any case, or the judgment of the trial court herein, but merely is an expression of the thinking of said court.

Thus, it would appear that the following statement made by this Court in the case of *Lynch v. New York ex rel. Pierson*, 293 U. S. 52 at page 54 is particularly appropriate to and further determinative of this appeal:

> "It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, and that it actually decided or that the judgment as rendered could not have been given without deciding it."

See also:

Durley v. Mayo, 351 U. S. 277, rehearing denied 352 U. S. 859.

III.

This Appeal Does Not Present a Substantial Federal Question.

A. This Appeal Fails to Present a Substantial Federal Question for the Reason That Appellants Have Failed to Exhaust Available and Adequate Administrative Remedies.

The exhaustion of available and adequate administrative remedies is a jurisdictional condition precedent to obtaining judicial relief even on constitutional grounds in the federal courts, including the Supreme Court of the United States. (*Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Lichter v. United States*, 334 U. S. 742; *Public Service Comm. of Utah v. Wycoff* 344 U. S. 237; *Bates v. Batte*, 187 F. 2d 142, cert. denied 342 U. S. 815; *Holmes v. United States*, 89 Fed. Supp. 894, affirmed 339

U. S. 927, rehearing denied 339 U. S. 954; *Perkins v. Endicott Johnson Corp.*, 128 F. 2d 208, affirmed 317 U. S. 501; and most recently, *Ohio ex rel. Jaus v. Carlton*, 154 N. E. 2d 150, Ohio, appeal dismissed 359 U. S. 312, 3 L. Ed. 2d 831).

In connection with the rule above-stated the following statement of this Court in the case of *Public Service Comm. of Utah v. Wycoff*, 344 U. S. 237, at page 246 appears to be particularly appropriate here:

> "* * * the declaratory judgment procedure will not be used to pre-empt and prejudge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review. It would not be tolerable, for example, that declaratory judgments establish that an enterprise is not in interstate commerce in order to forestall proceedings by the National Labor Relations Board, the Interstate Commerce Commission or many agencies that are authorized to try and decide such an issue in the first instance. (Citation of Authority). Responsibility for effective functioning of the administrative process cannot be thus transferred from the bodies in which Congress has placed it to the courts." (Parenthesis added.)

In an attempt to side-step this settled rule of federal judicial practice, appellants urge that an exception should be made in their case on the grounds that the cost of exhausting the administrative remedy is great and that the outcome is a foregone conclusion.

Their argument with respect to cost has already been settled by this Court in the case of *Myers v. Bethlehem Shipbuilding Corp., supra*, 303 U. S. 41. Their argument

with respect to the assertion that the outcome of the administrative proceeding before the Board of Building and Safety Commissioners is a foregone conclusion is not supported by *facts* contained in the Record on Appeal or in the Statement of Jurisdiction; and is contrary to sound reason, to the decisions of the California courts sustaining similar proceedings by the Appellee Board (See particularly: *Stoetzner v. City of Los Angeles*, 170 A. C. A. 485, 338 P. 2d 971; *Perepletchikoff v. City of Los Angeles*, 174 A. C. A. 749, 345 P. 2d 261), and to the California and federal presumption that official duty will be regularly and properly performed. (Cal. Code, Civ. Proc., sec 1963 (15); *Poulos v. State of New Hampshire*, 345 U. S. 395, rehearing denied 345 U. S. 978).

The principle case cited by Appellants to sustain their position in this respect is the recent case of *Staub v. Baxley*, 355 U. S. 313, in which this Court held that a substantial federal question was presented with respect to a City of Baxley, Georgia ordinance requiring a permit to solicit membership in a labor union despite the fact that the appellant in that case had failed to apply for or obtain the required permit.

The *Staub* case is easily distinguishable on its facts from the principle laid down by this Court in such cases as *Myers v. Bethlehem Shipbuilding Corp., supra*, 303 U. S. 41; and as distinguished is not in point in this appeal.

In the *Staub* case the ordinance in question provided no administrative remedy or accusatory process as is involved here. The ordinance merely required a permit which Staub refused to obtain, whereupon he was charged with and convicted in a Georgia court of violating the ordinance. There was no question in the *Staub*

case of an interference with an administrative proceeding or of the exhaustion of an available administrative remedy; but only the question of whether Mr. Staub, a union organizer, could be lawfully required by the subject ordinance to obtain a permit as a condition precedent to engaging in his occupation.

B. This Appeal Fails to Present a Federal Question With Respect to Sections 96.100 Through 96.128 of the Los Angeles Municipal Code for the Reason That These Sections Constitute a Valid and Proper Exercise of the Police and Taxing Powers of the City of Los Angeles.

1. THE SUBJECT SECTIONS OF THE LOS ANGELES MUNICIPAL CODE ARE REASONABLY RELATED TO ACCOMPLISHING A PUBLIC HEALTH, SAFETY, MORALS OR GENERAL WELFARE OBJECTIVE, AND ARE NOT ARBITRARY.

Assuming, for the sake of argument only, that Appellants' contention is correct: that the decision of the District Court of Appeal, although not expressly so, has the effect of deciding and upholding the constitutionality of sections 96.100 through 96.128 of the Los Angeles Municipal Code on their face. Such a decision, even if it had been made, would not present a federal question to this Court for the reason that said sections do not deprive the appellants of their property without due process of law nor deny them the equal protection of the law. On the contrary, said sections constitute a valid and proper exercise of the police and taxing powers of the City of Los Angeles, a freeholders chartered municipal corporation, organized and existing under the Constitution and laws of the State of California.

The term "police power" is an attribute of sovereignty, and is founded on the *duty* of the state to protect its

citizens and to provide for the safety, good order and well being of society.

Under its police power, the City of Los Angeles, in a proper case, has the power, acting in the interest of the public health, safety, morals or general welfare, to regulate private property. (*L'Hote v. New Orleans*, 177 U. S. 587; *Erie Railroad Company v. Williams*, 233 U. S. 685; *Miller v. Board of Public Works*, 195 Cal. 477, 38 A. L. R 1497; *Clemons v. City of Los Angeles*, 36 Cal. 2d 95).

As a proper exercise of its police power, the City of Los Angeles, may establish by ordinance the conditions which constitute a public nuisance with respect to buildings and may by ordinance provide for the abatement of such conditions; and is not bound by or limited to other statutory or common law concepts of either the definition or method of abatement of a public nuisance. (*Lawton v. Steel*, 152 U. S. 133; *Maguire v. Reardon*, 41 Cal. App. 596; aff'd 255 U. S. 271; *Queenside Hills Realty Co. v. Saxl*, 328 U. S. 80; *Haddacheck v. Sebastian*, 239 U. S. 394, affirming 165 Cal. 416; *Berman v. Parker*, 348 U. S. 26; *People v. Johnson*, 129 Cal. App. 2d 1; *Odd Fellows Cemetery Assn. v. San Francisco*, 140 Cal. 226, 231; *Boyd v. Sierra Madre*, 41 Cal. App. 520.)

As the abatement of public nuisances is one aspect of the police power, the ordinance defining the nuisance (or hazardous or objectionable condition) and providing the methods for the abatement of such a condition is valid if it meets the test of a proper exercise of such a power, to wit: if it has a reasonable relation to achieving a public health, safety, morals or general welfare objective, and is not arbitrary. This test is one of *reasonableness*, not scientific precision; and such a regulation will not be declared invalid because a court may regard it as ineffectual,

or harsh, or in aid of an objectionable policy. (*First National Benefit Society v. Garrison*, 59 Fed. Supp. 962, 155 F. 2d 552; *California State Auto Assn. Inter-Insurance Bureau v. Maloney*, 341 U. S. 105; *Sandstrom v. Cal. Horse Race. Board*, 31 Cal. 2d 401 cert. denied 355 U. S. 814, 3 A. L. R. 2d 90). The precise *term* used to designate such condition is immaterial. What is material are the conditions established and the methods provided.

The challenged sections of the Los Angeles Municipal Code meet this test.

These sections require:

(1) An investigation to determine initially whether there is probable cause to believe that a building is "dangerous," or if residential, "dangerous or substandard" *in fact* within the terms of the applicable ordinances;

(2) A hearing (after notice has been given to all parties) to ascertain and gather all of the evidence and testimony available with respect to the condition of the building *in fact* in order to ascertain whether such conditions constitute the building as a "dangerous or substandard" building, and if so, to determine the proper method of abating the nuisance.

(3). Written findings of fact based upon the evidence adduced; and

(4) A full and fair consideration of such evidence in order to determine if the building is "dangerous or substandard," and if so, whether it can be reasonably repaired, or whether it must be demolished.

It is settled in the California law of statutory construction that the standards required for a valid delegation of legislative power to an administrative body need be only as detailed as the subject matter permits and requires

(*California State Auto etc. Bureau v. Downey*, 96 Cal. App. 2d 876; *Gaylord v. City of Pasadena*, 175 Cal. 433; *Mitchell v. Morris*, 94 Cal. App. 2d 446); and that the essential requirement of due process is met when the administrative body is required to determine the existence or non-existence of the necessary facts before any decision by them is made. (*Wheeler v. Gregg*, 90 Cal. App. 2d 348, *In re Petersen*, 51 Cal. 2d 177).

Section 96.101 (a) provides 16 conditions which may constitute a building as "dangerous"; and Section 96.101 (b) sets forth the conditions which may constitute a residential building "substandard" by reference to Division 49 of Article 1 of Chapter 9 of the Los Angeles Municipal Code relating to Housing Standards.

Section 96.101.2 declares that all "dangerous buildings or substandard residential buildings" are public nuisances which shall be repaired, vacated or demolished as set forth in Section 96.112.

Section 96.112 provides the following standards for the repair, vacation, or demolition of "dangerous buildings or substandard residential buildings:"

"(a) If the dangerous or substandard residential building can be *reasonably repaired so that it will no longer exist in violation of the Los Angeles Municipal Code*, it shall be ordered repaired.

(b) If the dangerous or substandard residential building is in such condition as to make it *dangerous to the health, morals, safety or general welfare of its occupants*, it shall be ordered vacated.

(c) In any case where a dangerous building is 50 *per cent damaged or decayed, or deteriorated*, it shall be demolished.

(d) In all cases where a dangerous building or a substandard residential building *cannot be reasonably repaired so that it will no longer exist in violation of the terms of the Los Angeles Municipal Code*, it shall be vacated and demolished.

(e) In all cases where a dangerous building or a substandard residential building is a *fire hazard, existing or erected in violation of the terms of this division or any ordinance* of the City, *or statute* of the State of California, it shall be demolished." (Emphasis added.)

In addition to defining and providing a method for the abatement of public nuisance buildings, said sections permit the City to abate the nuisance if the owner of the building refuses to do so and to recover the cost of the abatement which it performs through the imposition of an assessment lien upon the real property upon which the particular building was located. (Secs. 96.119 and 96.120.1). Before such a lien may be imposed upon such property, however, a regular assessment proceeding before the Los Angeles City Council is required, including the giving of notice, the holding of a hearing before the Council, the hearing of protests against the assessment, and the recordation of the lien if imposed. (Sec. 96.121.)

As none of these provisions are at issue herein, the Appellees will not burden this argument by discussing them further.

2. APPELLANTS' CONTENTIONS WITH RESPECT TO THE MEANING OF THE SUBJECT SECTIONS OF THE LOS ANGELES MUNICIPAL CODE AND TO THEIR ENFORCEMENT BY THE APPELLEES ARE NOT SUPPORTED BY THE PLAIN MEANING OF THEIR PROVISIONS OR BY THE FACTS IN THE RECORD ON APPEAL.

These sections do not declare wooden buildings *per se*, to be demolishable public nuisances, regardless of their location. The particular section cited by the Appellants in support of such contention (Sec. 90.101 (a) (13)) does not refer to wooden buildings. On the contrary it states:

> "Any building or structure, whether or not erected in accordance with all applicable laws and ordinances, has in any non-supporting part, member or portion, less than 50 per cent, or in any supporting member less than 66 per cent of the strength, fire resisting qualities or characteristics weather-resisting qualities required by law or ordinance in the case of a newly constructed building of like area, height and occupancy in the same location."

(is a dangerous building).

This section merely provides one of the criteria for determining the existence of a "dangerous" building. It is applicable to all buildings, wooden or otherwise, regardless of where located, in a fire district or otherwise. It does not provide any standard for and is essentially unrelated to, the determination of what is to be done about such conditions if they are found to exist.

Appellees do not contend that they have the power to destroy property which is not in *fact* deleterious to the public health, safety and general welfare. On the contrary,

Appellees contend that the provisions of sections 90.100 through 90.128 of the Los Angeles Municipal Code establish reasonable standards *in fact* for the determination of the existence of unsafe and hazardous structures (or portions thereof) and for the determination of the manner or method of the abatement of such structures or the conditions existing in them.

Appellants' statement that Appellees are engaged in a comprehensive program of municipal rehabilitation in its central city, is not only no more than a re-statement of the legal conclusion to that effect in their amended complaint, it is not supported by facts contained in the Record on Appeal, is wholly immaterial to the determination of the validity of the subject sections of the Los Angeles Municipal Code on their face and at this stage of the administrative process, and flies in the face of the fact that the California courts have sustained the subject administrative process and orders resulting therefrom. (*Stoetzner v. City of Los Angeles*, 170 A. C. A. 485, 388 P. 2d 971; *Perepletchikoff v. City of Los Angeles*, 174 A. C. A. 749, 345 P. 2d 261).

These sections of the Los Angeles Municipal Code do not shift the burden of proof to the property owner, a is contended by Appellants. The language used in section 90.106 is commonly used in accusatory proceedings of this type. For example, similar language is used in the public nuisance building abatement provisions of the Housing Act of the State of California. (Secs. 17821-29, Cal. Health and Safety Code). Moreover, it has been specifically held by the California courts, in a case cited by Appellants, that the language contained in said section does not shift the burden of proof onto the property owner, but that such burden is upon the City. (*Armi-*

stead v. City of Los Angeles, 152 Cal. App. 2d 319). Appellees do not now contend and have never contended otherwise.

Appellants' contention that the subject sections of Los Angeles Municipal Code unjustly discriminate against owners of buildings subjected to proceedings had thereunder as distinguished from owners of buildings not so subjected is not supported by the plain meaning of their provisions.

In the first place, a building is not "subjected" to such proceedings unless the Board or the Superintendent of Buildings shall have first determined from the report of the Building Inspector that there is probable cause to believe that the building is "dangerous or substandard." This establishes a distinction in fact between such buildings and others.

Furthermore, the stresses required for repair or demolition of such a building may properly, within the framework of the Building Codes, be more restrictive. In fact, however, they are not.

Section 91.0103 (a), with which Appellants claim the standards provided in sections 90.101 (a) (2), (10) and (13) conflict and thus allegedly result in unlawful discrimination, states:

> "(a) Maintenance. Any portion of any building or structure which is a menace to life or limb, health, property or public welfare shall be restored to a reasonable condition of stability and safety, or shall be made to conform to the regulations of this Code, (Building Code), or be demolished. A building or portion thereof shall be presumed to be a menace to life or limb, health, property or public welfare if any of the following conditions exist:

(1) When the stresses in any member, computed on the basis of the loads specified by this Code (Building Code), exceed twice the working stresses permitted by this Code. (2) When any exit, fire-protective construction or safety device does not provide the required degree of security to life or limb, health, property or public welfare. (3) When the building or structure is a dangerous building or a substandard residential building within the terms of the Los Angeles Municipal Code." (Parenthesis added.) These provisions apply to all buildings in the City.

It is apparent that Appellants have overlooked subdivision (3) of section 91.0103 (a), and have confused the term "working stresses" used in said section with the term "stress—due to all dead and live loads" used in section 96.101 (a) (2).

Moreover, the standards set forth in Sections 96.101 (a) (10) and (13) are specifically recognized by subdivision (3) of section 91.0103 (a); provide entirely different tests or criteria for structural stability than is provided by the "working stresses concept" of subdivision (1) of section 91.0103 (a); and provide, in addition to a test of structural stability, a measure of dilapidation, deterioration, fire-resistiveness and weather-resistiveness not found in section 91.0103 (a) (1).

The provisions of Sections 96.101 (a) (2), (10), and (13) apply only to buildings which have been inspected and which exhibit conditions causing a determination of probable cause to believe such buildings are dangerous or substandard.

C. This Appeal Fails to Present a Federal Question With Respect to the Application of the Ordinance to the Appellants for the Reason That on the Basis of the Facts Contained in the Record on Appeal Such a Question Is Not Before This Court.

As previously discussed hereinabove, Appellants' contention that Sections 96.100 through 96.128 will be unlawfully and improperly enforced against them is not supported by *facts* contained in either the Statement of Jurisdiction or the Record on Appeal; is based wholly upon statements of legal conclusions contained in their amended complaint; and is contrary to the California and federal presumption that official duty will be regularly and properly performed. Moreover, as has been specifically discussed by the California courts herein, such a contention is premature.

Appellants' contention that they have been denied the due process of the law because of asserted deficiencies in the notices of the hearing which they have received serves only to further confuse the real and even asserted issues in this appeal.

Appellants do not claim a lack of statutory notice; and on the basis of the facts contained in the Record on Appeal apparently possess actual notice of the nature and character of the administrative hearing with respect to which they seek judicial intervention. On the contrary, Appellant's contention in this respect is that the notices which they have received described the property, consisting of several buildings located upon a fairly large industrial site, as a whole without separate and individual legal descriptions of the particular building sites within said larger site.

With respect to this matter, the Superior Court, in its "Opinion and Order Upon General Demurrer" states:

> "* * * Pages 28-29 (subparagraph) 25 (of paragraph XV of Appellants' amended complaint on file herein). No constitutional rights are prejudiced. (1) as a matter of notice, this paragraph (subparagraph 25 of paragraph XV of said complaint) demonstrates plaintiffs' full knowledge of the scope and extent of the inquiry in these proceedings. (2) Since these structures are identified, the exact land on which each is located is *ipso facto* identified (Cal. Civil Code sec. 3538). (3) Where every structure is upon an identified single parcel of land in one ownership, no constitutional or other legal parcel of land in one ownership, no constitutional or other legal problems are involved. (4) There is no requirement that the physical limits of each precise portion of a larger parcel of plaintiffs' property upon which each building is physically situated be described in institution of a proceeding. (Los Angeles Municipal Code Sec. 91.106) (5) There is no reasonable doubt that defendants are proceeding against every building in which there is alleged to exist some condition in violation of law. * * * " (App. B, Statement of Jurisdiction, p. 35; Parenthesis added.)

Appellants' argument in support of this contention, that because these administrative proceedings may culminate in the imposition of an assessment lien against their property, the exact legal description of each building site on the entire industrial site is thereby required, is, like the contention which it attempts to support, confusionary. Such an argument ignores, and thus, misrepresents the specific provisions in the subject sections of the Los Angeles Municipal Code providing for further notice

and hearing as a part of a regular assessment proceeding before such a lien may be imposed in those cases where the property owner's refusal to abate the nuisance brings such a further proceeding into being.

Summary.

Perhaps the most important résumé which Appellees might make of their argument and the matters contained in the Statement of Jurisdiction, apart from the matters with respect to the appellate jurisdiction of this Court herein which will not be further discussed, is to emphasize the spurious and mis-leading nature of Appellants' contentions.

Appellants' case before this Court, ignoring the matters relating to the appellate jurisdiction of this Court, is simply this:

Are Sections 96.100 through 96.128 of the Los Angeles Municipal Code so patently unrelated to the public health, safety, morals or general welfare that there is no way in which Appellees may lawfully proceed under them?

Nevertheless, Appellants use such mis-leading arguments as: the City is using these sections to rehabilitate its central city without payment and without proving that such rehabilitation is necessary in fact; the sections declare a wooden building to be a demolishable public nuisance; and the City cannot and will not use these sections lawfully.

A specific example of the spurious nature of Appellants' arguments is found in their closing statement in subparagraph 2, page 14, of their Statement of Jurisdiction, to wit:

> "The issue here is unlawfullness of the tribunal and its procedure, not of its product."

It is difficult to understand such a statement in light of Appellants' numerous contentions to the effect that Appellees have not and will not proceed lawfully and properly under the ordinance.

Furthermore, it is difficult to understand just exactly what such a statement means. If the tribunal's product is acceptable, as it has been determined by the California courts to be (*Stoetzner v. City of Los Angeles*, 170 A. C. A. 485, 338 P. 2d 971; *Perepletchikoff v. City of Los Angeles*, 174 A. C. A. 749, 345 P. 2d 261), and as it is presumed to be until evidence is received to the contrary (*Poulos v. State of New Hampshire*, 345 U. S. 395, rehearing denied 345 U. S. 978), it seems only logical to assume that the tribunal and its procedure must also be acceptable; or at least not so lacking in constitutionally accepted authority nor so unrelated to the public health, safety, morals or general welfare that there is no possibility of proceeding lawfully under it.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the appeal in this cause should be dismissed.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney,

BOURKE JONES,
Assistant City Attorney,

MARCUS E. CRAHAN, JR.,
Deputy City Attorney,

Attorneys for Appellees.

APPENDIX A.

Section 1094.5, *California Code of Civil Procedure.*

"[Inquiry into validity of administrative order or decision] (a) Where the writ is issued for the purpose of inquiring into the validity of any administrative order or decision made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer, the case shall be heard by the court sitting without a jury. All or part of the record of the proceedings before the inferior tribunal, corporation, board or officer may be filed with the petition, may be filed with respondent's points and authorities or may be ordered to be filed by the court. If the expense of preparing all or any part of the record has been borne by the prevailing party, such expense shall be taxable as costs.

"(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

"(c) Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence; and in all other cases abuse of discretion is established if the court determines that the

findings are not supported by substantial evidence in the light of the whole record.

"(d) Where the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (e) of this section remanding the case to be reconsidered in the light of such evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit such evidence at the hearing on the writ without remanding the case.

"(e) The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law but the judgment shall not limit or control in any way the discretion legally vested in the respondent.

"(f) The court in which proceedings under this section are instituted may stay the operation of the administrative order or decision pending the judgment of the court, or until the filing of a notice of appeal from the judgment or until the expiration of the time for filing such notice whichever occurs first; provided that no such stay shall be imposed or continued if the court is satisfied that it is against the public interest. If an appeal is taken from a denial of the writ, the order or decision of the agency shall not be stayed except upon the order of the court to which such appeal is taken; provided that, in cases where a stay is in effect at the time of filing the

notice of appeal, such stay shall be continued by operation of law for a period of twenty (20) days from the filing of such notice. If an appeal is taken from the granting of the writ, the order or decision of the agency is stayed pending the determination of the appeal unless the court to which such appeal is taken shall otherwise order. Where any final administrative order or decision is the subject of proceedings under this section, if the petition shall have been filed while the penalty imposed is in full force and effect the determination shall not be considered to have become moot in cases where the penalty imposed by the administrative agency has been completed or complied with during the pendency of such proceedings. (California Statutes 1945, Chapter 868).

APPENDIX B.

Section 1060, *California Code of Civil Procedure.*

"[Declaratory relief.] Any person interested under a deed, will, or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property, or with respect to the location of the natural channel of a watercourse, may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action in the superior court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract. He may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form and effect, and such declaration shall have the force of a final judgment. Such declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought." (California Statutes, 1921, page 689; The construction of a State statute such as the California Declaratory Relief Act, is the exclusive responsibility of the State courts, and is not subject to review by this Court. (*Speiser v. Randall*, 357 U. S. 513).